

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF WESTCHESTER
2 - - - - - - - - - - - - - - - - - x
3 PROJECT VERITAS,
3 Plaintiff,
4 -against- INDEX NO.: 632921-2020

4 THE NEW YORK TIMES COMPANY, MAGGIE ASTOR,
5 TIFFANY HSU, and JOHN DOES 1-5,
5 Defendants.

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7 CONFERENCE

8 Westchester County Courthouse
8 111 Dr. Martin Luther King, Jr., Blvd.
9 White Plains, New York
9 November 23, 2021

10 BEFORE: HON. CHARLES D. WOOD,
10 Justice of the Supreme Court

11 APPEARANCES:

12 For the Plaintiff:

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14 BY: LIBBY LOCKE, ESQ.
14 AND: ANDY PHILLIPS, ESQ.

15 For the Plaintiff:

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21 For the Defendant, THE NEW YORK TIMES COMPANY:

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23 ALSO PRESENT:

24 Danielle Robinson, Senior Court Clerk
24 Elyse Angelico, Esq. Principal Law Clerk

25 Nadine Kristoferson,
25 Senior Court Reporter

1 granted in *Omni Health*.

2 We also cited the *Surgical Design Court* case
3 where the Appellate Division, the Second Department, in
4 2005, it's a very similar fact pattern, the defendants
5 were former employees of the plaintiff and they retained
6 attorney-client privileged materials from their
7 employment, and the defendants gave the attorney-client
8 materials to a lawyer who didn't notify the plaintiff and
9 tried to make use of them for their benefit for their
10 clients in the litigation. This was outside the formal
11 discovery process and the defendants obviously obtained
12 those materials before discovery had started, before the
13 litigation even started, again, an irregular way outside
14 the formal 3102 channels of obtaining discovery. And,
15 again, Second Department said that those violated the
16 substantial rights of the plaintiff and ordered the
17 suppression of the materials.

18 The New York Times' own briefing can't
19 grapple -- they say it's all about the formal discovery
20 process, it's all about Article 31, Article 31 recognizes
21 both formal and informal discovery requests.

22 THE COURT: I'm going to interrupt you just for
23 a moment to pose a question because I didn't -- in
24 reading what Mr. Kurtzberg's, his briefing last night, it
25 seems that I don't disagree with what you're saying with

1 respect to this being part of discovery, and under normal
2 circumstances, I think pretty much with any other
3 litigant, this would be a routine discovery issue that
4 would be decided in due course probably by a Court
5 Attorney Referee, although we're changing how we do
6 things around here and it will now be judges, but this
7 would be a routine discovery issue, and I don't think
8 there's much doubt that any other litigant would be
9 prohibited from utilizing that material, certainly in the
10 course of the litigation.

11 So in reading one of the cases cited by
12 Mr. Kurtzberg, which I believe was out of Suffolk County,
13 about 2007, the *Nicholson* case, and that certainly is not
14 an all fours with what we have here, but in that case
15 the -- because The New York Times is -- because both
16 sides here are media organizations, they seem to, at
17 least The Times is claiming that it has a different
18 status as a news organization. And the case, the
19 *Nicholson* case, again, not on all fours, but it does
20 basically say that as long as the press did not
21 improperly conspire to obtain material that was covered
22 by the privilege, the press or the interveners in that
23 case, had been fed the information and the information in
24 that case, I think, was certainly more public interest
25 than in this case, but in any event, the press had been

1 fed the information by a litigant. And in that case,
2 again, I only had an hour or so to look at it, but it
3 looks like the judge came down pretty hard on the
4 litigants but allowed the press to publish, or at least
5 report, on those materials. I don't think they were
6 publishing the actual documents in that case.

7 So I guess the question is: Does, by virtue of
8 the fact that we have a litigant that is also press, did
9 they get a special exemption from the rest of the rules
10 about discovery?

11 MS. LOCKE: Directly, Your Honor, no, they
12 don't.

13 The United States Supreme Court in *Cohen versus*
14 *Cowles Media*, it's a 1991 case says expressly: It is,
15 therefore, beyond the dispute that the publisher of a
16 newspaper has no special immunity from the application of
17 general laws. This is a law of general applicability and
18 it applies regardless of the defendant's status as a
19 media entity or a nonmedia entity.

20 And I have not had an opportunity to review the
21 *Nicholson* case yet. So I'm not familiar with the facts
22 but there's something that you said that suggested to me
23 that it may not be on all fours, which is that the press
24 had intervened into the case. I guess my question is:
25 Was that an access, a right of access case by the press